BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-8383
File: 47-182068 Reg: 04057566

ACAPULCO RESTAURANTS, INC. dba Acapulco
3113 W. Olive Avenue, Burbank, CA 91505,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: November 3, 2005
Los Angeles, CA

ISSUED DECEMBER 29, 2005

Acapulco Restaurants, Inc., doing business as Acapulco (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, all of which were conditionally stayed for one year, for its bartender, Lamberto Chavez, having sold and/or furnished bottles of Coors beer to 19-year-old Silvie Siwadjian and 19-year-old Natalie Avedissian, both of whom were acting as police minor decoys, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Acapulco Restaurants, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated December 30, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on March 3, 1986. Thereafter, the Department instituted an accusation against appellant charging the sale or furnishing of an alcoholic beverage to each of the above-named minors. An administrative hearing was held on November 19, 2004, at which time oral and documentary evidence was received. At that hearing, the evidence established that appellant's bartender asked each of the 19-year-old minors for identification. Each produced her own authentic California driver's license. Each license contained a red stripe and the words "Age 21 in 2005." The bartender returned the licenses to them, and served each of them a bottle of Coors beer. One of the two minors paid for the beer. An undercover officer inside the premises advised the bartender of the violation. The minors, who had exited the premises, reentered the premises and identified the bartender as the person who sold them the beer. A citation was issued.

Subsequent to the hearing, the Department issued its decision which determined the charge of the accusation had been established, and appellant had not established an affirmative defense under Rule 141(b)(5).

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department failed to demonstrate compliance with Rule 141(b)(5); and (2) appellant was denied due process as a result on an ex parte communication to the Department or its decision maker.

DISCUSSION

I

Rule 141(b)(5) provides that, following any completed sale, but not later than the issuance of a citation, the peace officer directing the decoy shall make a reasonable

attempt to enter the licensed premises and have the decoy make a face to face identification of the alleged seller. Appellant asserts that although the evidence in this case shows there was a sale, a face to face identification, and the issuance of a citation, it fails to show these occurred in the proper sequence. Appellant argues that the administrative law judge (ALJ) was not entitled to infer that there had been compliance with the rule on the basis of the police officer's testimony that the citation was issued after the decoys had left the premises a second time, and that it is not appellant's burden to establish non-compliance with the rule.

The ALJ found (Finding of Fact 8):

> Based on the totality of the evidence it was established that the minors' face-to-face identification of bartender Chavez as the seller of the beer took place prior to the issuance of the citation. This is based on the testifying officer's testimony that although he did not observe the sequence of these events, he did observe that the citation had been issued after the second time the minors had exited the premises.
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> From this it is inferred that since the minors had left the premises, once after they had purchased beer and a second time after they had made a face-to-face identification, ergo, the citation must have had to be issued subsequent to the identification having taken place. Moreover the minors were not in the premises when the citation was issued, having left, and the customary procedure of the Burbank Police in minor decoy operations was to issue a citation subsequent to the face-to-face identification.
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> There is no credible evidence in the record to support the position of the respondent that the proper procedure was not followed.

Appellant premises its appeal on the contention that the Department bears the burden of proof on the issue whether there was compliance with Rule 141(b)(5). We do not agree. Moreover, even if we were to assume, which we do not, that the Department had such a burden in this case, the evidence shows that it was satisfied.

Decoy Siwadjian testified that she and decoy Avadissian left the premises after receiving the change from their purchase, reentered the premises "right away,"

identified the seller, and again left the premises. Decoy Avadissian testified to similar effect. Neither was asked if they were present when the citation issued.

Officer Gomez testified that the citation was issued after the decoys had left the premises for the second time. It necessarily follows that the citation was issued after the decoys had gone through the identification process, and the ALJ was able to draw such an inference from Officer Gomez's and the decoys' testimony. We cannot say that the inference drawn by the ALJ was unreasonable. In such circumstances, we must uphold his decision.

We note that appellant offered no affirmative evidence relating to the issuance of the citation, doing little more than pointing to inconsistencies in Officer Gomez' testimony. Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

To the extent the Department has any burden under Rule 141, it was satisfied in this case. We do not read our decisions as establishing the contrary. Appellant's reliance on *Acapulco Restaurants, Inc. v. Dept. of Alcoholic Bev. Control* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126] is misplaced. Strict adherence to Rule 141 does

not require the rule be read to require the Department to disprove the existence of an affirmative defense where, as here, there is no evidence to support such a defense.

II

Appellant asserts the Department violated its right to procedural due process when the attorney representing the Department at the hearing before the ALJ provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. Appellant also filed a Motion to Augment Record (the motion), requesting that the report provided to the Department's decision maker be made part of the record. The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants filed motions and alleged due process violations virtually identical to the motions and issues raised in the present case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").[2]

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting

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[2] The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. *(Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt*, *supra*, at p. 1585.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the ALJ had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellant at the hearing. Appellant has not alleged that the proposed decision of the ALJ, which the Department adopted as its

own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellant has not argued to the contrary), and it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellant, it appears to us that appellant received the process that was due it in this administrative proceeding. Under these circumstances, and with the potential of an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

Under the circumstances of this case and our disposition of the due process issue raised, appellant is not entitled to augmentation of the record. With no change in the ALJ's proposed decision upon its adoption by the Department, we see no relevant purpose that would be served by the production of any post-hearing document. Appellant's motion is denied.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.